APPEAL NO. 040435
FILED APRIL 20, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 4, 2004. The hearing officer determined that: (1) the issues of whether the respondent (claimant) reached maximum medical improvement (MMI) and what is her impairment rating (IR) were not ripe for adjudication because she did not have a valid certification by a doctor that she reached MMI; and (2) that the claimant had disability for the period of July 12 through October 27, 2003. The appellant (carrier) appealed, arguing that the hearing officer did not give presumptive weight to the designated doctor's report and clarification and that the claimant did not have disability. The claimant responded, urging affirmance.

DECISION

Affirmed.

EVIDENTIARY RULINGS

The carrier appeals the hearing officer's decision to allow a witness to testify, contending that her name was not timely exchanged pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)). To obtain reversal of a judgment based on the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was, in fact, an abuse of discretion and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer determined that the claimant showed due diligence in notifying the carrier of the name of her witness, and he found good cause for the untimely exchange. We cannot conclude that the hearing officer's determination was an abuse of discretion. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986).

PRESUMPTIVE WEIGHT

The parties stipulated that on _____, the claimant sustained a compensable injury to the cervical, thoracic, and lumbar regions of her spine, as well as to her left upper extremity and a concussion to her head. It is undisputed that the claimant was involved in a motor vehicle accident in which her car hydroplaned in a construction zone and she hit cement barriers and an 18-wheel truck. The claimant was treated for her injuries, however she continued to have head and neck problems. The carrier's case manager referred the claimant to Dr. S, a neurologist, for treatment. In a letter dated May 14, 2003, Dr. S, the claimant's current treating doctor, opined that the claimant's headaches were due to her mild head injury and soft tissue injury to her

cervical paraspinous muscles. Additionally, Dr. S opined that the MRI of the brain showed that the claimant had cerebral palsy with spastic diplegia that explained her gait disturbance.

On July 12, 2003, the designated doctor, Dr. H, examined the claimant at which time she certified MMI on the same date and assigned a 0% IR. The designated doctor relied on the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) in making the certification. In a letter dated July 29, 2003, Dr. S stated that he disagreed with the designated doctor's certification of MMI/IR because the claimant's condition was improving with treatment and physical therapy. Additionally, Dr. S took issue with the designated doctor's report because she "did not address at all the aspect of headaches from the head injury" and that the claimant's gait was described as normal "when she has a significant spastic diplegia, which is documented in my records and sent to [Dr. H]." On September 11, 2003, the Texas Workers' Compensation Commission (Commission) requested clarification from the designated doctor and asked her to consider Dr. S's report, and to indicate whether this information would cause her to change her opinion regarding MMI/IR. The designated doctor responded that she reviewed the claimant's history and that the claimant did not reveal any history of cerebral palsy, that she reviewed Dr. S's report and there was no history given that showed the patient had cerebral palsy; that she observed that the claimant walked normally; that her assessment was based on her own notes and the claimant's treating doctor's notes as there were no other records available; that the claimant had a full range of motion (ROM) to the cervical, thoracic, and lumbar spine, and commented that if the claimant had cerebral palsy she would not have been able to perform the ROM test; and that she stood by her 0% IR. In a letter dated October 21, 2003, Dr. S responded that his initial report references that the claimant has cerebral palsy with spastic diplegia as evidenced by the abnormalities in the MRI of the brain and that the fact that Dr. H felt that the claimant had a normal gait "only speaks to the inadequacy of her examination."

Sections 408.122(c) and 408.125(c) provide that for a claim for workers' compensation benefits based on a compensable injury that occurs on or after June 17, 2001, the report of the designated doctor has presumptive weight, and the Commission shall base its determination of whether the employee has reached MMI and the IR on that report unless the great weight of the other medical evidence is to the contrary. If the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Rule 130.6(i) provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight. We further note that whenever a hearing officer rejects a designated doctor's report, the hearing officer should "clearly detail the evidence relevant to his or her consideration." Texas Workers' Compensation Commission Appeal No. 030091-s, decided March 5, 2003.

In the instant case, the hearing officer determined that the great weight of the other medical evidence was contrary to the finding of Dr. H that the claimant reached MMI on July 12, 2003, with a 0% IR. The hearing officer found that Dr. H made erroneous determinations concerning the claimant based on insufficient medical evidence. The hearing officer determined that Dr. H did not have the medical records of two doctors, three physical therapists, and a diagnostic test; and that Dr. H did not know who the claimant's treating doctor was at the time of her examination. Because the hearing officer determined that the designated doctor's certification was based on insufficient medical evidence, he did not err in determining that the designated doctor's MMI date and IR are not entitled to presumptive weight. We conclude that the hearing officer's determinations have sufficient legal and factual support and are not so against the great weight and preponderance of the evidence of the law as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W. 2d 175, 176 (Tex. 1986).

SECOND DESIGNATED DOCTOR

The Appeals Panel has held in limited cases involving disputes regarding the designated doctor's certification of MMI and assigned IR, that the hearing officer had an option of going back to the designated doctor a second (or third) time for clarification, or to adopt the IR of another doctor which was valid as provided for in Section 408.125, or to consider the appointment of a second designated doctor if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides. *See* Texas Workers' Compensation Commission Appeal No. 990907, decided June 14, 1999; Texas Workers' Compensation Commission Appeal No. 93932, decided November 29, 1993. In the instant case, the hearing officer did not adopt the treating doctor's certification of MMI and IR because Dr. S certified that the claimant reached MMI on October 27, 2003, but did not assign an IR. Additionally, it is undisputed that the claimant moved from Texas to Nevada in October 2003. The hearing officer determined that a second designated doctor should be appointed because the claimant resides in another state and therefore, Dr. H is unable to comply with the AMA Guides. We conclude that the hearing officer did not err in determining that the issues of MMI and IR were not ripe for adjudication because there is no MMI and IR certification from another doctor and because the claimant lives in another state a second designated doctor needs to be appointed to determine MMI and IR.

DISABILITY

The issue of disability is a question of fact for the hearing officer. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). We have reviewed the complained-of determination and conclude that the hearing officer's disability determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **FEDERAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

PARKER W. RUSH
1445 ROSS AVENUE, SUITE 4200
DALLAS, TEXAS 75202-2812.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Robert W. Potts
Appeals Judge